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13 PRODUCTIONS CO. LTD.

14 UNITED STATES DISTRICT COURT

15 CENTRAL DISTRICT OF CALIFORNIA

16 WESTERN DIVISION

17 UM CORPORATION, a Japanese
18 corporation,

19 Plaintiff,

20 vs.

21 TSUBURAYA PRODUCTIONS CO.
22 LTD., a Japanese corporation,

23 Defendant.

CASE NO. 2:15-cv-03764-AB-AJW

**DEFENDANT AND
COUNTERCLAIMANT
TSUBURAYA PRODUCTIONS CO.
LTD.'S OPPOSITION TO UMC'S
MOTION FOR JUDGMENT ON
THE PLEADINGS OR, IN THE
ALTERNATIVE, FOR SUMMARY
JUDGMENT**

Date: September 12, 2016

1
2 TSUBURAYA PRODUCTIONS CO.
LTD., a Japanese corporation,

3
4 Counterclaimant,

5 vs.

6 UM CORPORATION, a Japanese
7 corporation; ULTRAMAN USA, INC.,
8 a California corporation; SOMPOTE
9 SAENGDUENCHAI, a Thai individual;
10 GOLDEN MEDIA GROUP, INC., a
California corporation; TIGA
11 ENTERTAINMENT COMPANY,
LTD., a Hong Kong corporation; and
12 DOES 1-10,

13 Counterdefendants.
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Time: 10:00 a.m.

Location: Courtroom 4

Trial Date: August 22, 2017

Judge: Hon. André Birotte, Jr.

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Preliminary Statement

UMC's motion is premised on a misapprehension of the law of preclusion and an incredibly misleading and inaccurate description of the parties' foreign lawsuits relating to the validity of the so-called "1976 Agreement"—pursuant to which UMC claims rights in the "Ultraman" works that Tsuburaya created decades ago. UMC's desire to avoid having to face the evidence showing that the 1976 Agreement was forged by counter-defendant Sompote Saengduenchai is understandable: earlier this year, in consideration of that evidence, the Thai Court of Appeal affirmed a judgment in which Sompote was *sentenced to jail* for having falsified that document. Now that, as Tsuburaya contends, Sompote has been served with Tsuburaya's counterclaims and is subject to the Court's jurisdiction, UMC, whose principal is Sompote's son, argues that the Court should not consider the evidence at all, but instead should find that Tsuburaya is precluded from even arguing that the 1976 Agreement is invalid. There is no basis to apply preclusion, at least *against* Tsuburaya, and UMC's motion should be denied, or at a minimum deferred pending additional discovery.

In particular, UMC argues that judgments rendered in Japan in 2010 and in China in 2013 are preclusive against Tsuburaya on the validity of the 1976 Agreement because those judgments are the "last-in-time" on the issue. This argument fails. As an initial matter, if *any* foreign judgment is to be followed as the "last-in-time," then it would be one of several recent judgments from *Thailand* that found the 1976 Agreement to be a forgery. UMC completely ignores these Thai judgments, each of which post-dates the Japanese and Chinese judgments on which UMC relies and completely undermines the factual basis for UMC's motion.

Moreover, even if the judgments from Japan or China were the "last-in-time," that doctrine does not apply to judgments of foreign courts that were not, themselves, bound by principles of res judicata to follow an earlier judgment. Because the courts in Japan and China were not bound to recognize a 2007 judgment of the Thai Supreme

1 Court that found the 1976 Agreement to be a forgery, there is no basis for this Court to
2 follow either of those court's later judgments as the "last-in-time."

3 Apart from the fact that the "last-in-time" doctrine does not apply to the Japanese
4 or Chinese judgments as a matter of fact or law, there are additional reasons for this
5 Court to decline to exercise its discretion to follow those judgments as a matter of
6 international comity.

7 *First*, the purported final decision of the Japanese district court that UMC argues
8 is preclusive in fact has no preclusive effect at all because—as UMC egregiously fails
9 to inform the Court—*it was overturned on appeal in Japan*, resulting in a final
10 judgment by the Japan Supreme Court that was entirely *in favor of Tsuburaya and*
11 *against UMC*.

12 *Second*, in accordance with their procedural rules, neither the Japanese nor
13 Chinese courts afforded Tsuburaya the opportunity to take discovery into its claim that
14 the 1976 Agreement was forged. The availability of broad discovery procedures here
15 strongly counsels against deferring to China and Japan as a matter of international
16 comity and in favor of allowing this case to proceed through discovery.

17 *Third*, while UMC purports to seek to apply preclusion only as to Tsuburaya's
18 counterclaims for copyright infringement, a ruling that the 1976 Agreement is valid
19 would likewise benefit UMC's reciprocal offensive claims against Tsuburaya for
20 copyright infringement. Based on concerns about unfairness, however, *offensive issue*
21 *preclusion* does not apply in the face of inconsistent judgments (let alone inconsistent
22 *foreign* judgments). Because the validity of the 1976 Agreement will need to be
23 decided based on the evidence at least as to UMC's offensive claims for infringement,
24 there is no basis to apply preclusion as to Tsuburaya's counterclaims either.

25 *Fourth*, even though discovery is far from complete, there already exists
26 compelling evidence showing that the 1976 Agreement is invalid—including
27 handwriting analyses by Thai government officials and by Tsuburaya's expert in this
28 case that found the document to be a forgery. Sompote's months-long attempt to evade

1 service of Tsuburaya's counterclaims followed by his failure to appear in this case to
2 defend the validity of the 1976 Agreement provide further evidence of the falsity of that
3 document. In light of this evidence and more that belies the judgments in Japan and
4 China, the Court should decline to defer to those judgments now, or at least should
5 permit further discovery on their preclusive effect.

6 Further, if the Court chooses to apply preclusion at all, then UMC's relief should
7 be limited to *issue preclusion* on the narrow question of the validity of the 1976
8 Agreement. UMC is not, however, entitled to the much broader relief it seeks—
9 including the dismissal of Tsuburaya's counterclaims—because, even if the 1976
10 Agreement is “valid,” those claims survive to the extent that UMC has violated
11 Tsuburaya's copyrights in the Ultraman works by exceeding the scope of its (alleged)
12 rights under that agreement. Indeed, UMC notably fails to address that *all* the foreign
13 courts that have construed the 1976 Agreement have concluded that it does not contain
14 the broad transfer of copyrights that UMC claims to have received, but instead is
15 limited to the exploitation of a handful of specified Ultraman works from the 1960s.
16 Because questions regarding the scope of the 1976 Agreement, and thus whether UMC
17 has exceeded that scope, must be determined regardless of the outcome of this motion,
18 UMC is entitled to narrow relief, at most.

19 Finally, UMC's motion for summary judgment on Tsuburaya's defenses
20 premised on the “termination” of the 1976 Agreement should also be denied. Even
21 assuming the validity of that contract, disputed questions of fact exist as to whether
22 UMC or its privies have materially breached it in a manner that allows Tsuburaya to
23 terminate it. At a minimum, Tsuburaya should be permitted to develop evidence to
24 support its termination defense through discovery before it is adjudicated on its merits.

25 For these reasons and others discussed below, UMC's motion should be denied.¹

26
27 ¹ While UMC has now exhausted its sole summary judgment motion permitted by
28 the Court's Order re Jury Trial (Dkt. 23 at 3-4), Tsuburaya reserves its right to later
seek summary judgment, including on the basis of preclusion or on the sufficiency of
the evidence to be developed through discovery.

Statement of Facts²

A. Tsuburaya's Creation Of Ultraman

In the early 1960's, Japanese entertainment company Tsuburaya, led by its founder, renowned filmmaker Eiji Tsuburaya, created the superhero character "Ultraman." (Counterclaims of Tsuburaya, September 11, 2015, Dkt. 19 ("CC"), at ¶¶ 2, 16; Declaration of Shinichi Ooka ("Ooka Decl.") ¶¶ 3-4.) By 1973, the library of Ultraman movies included *Ultra Q*, *Ultraman*, *Ultra Seven*, *The Return of Ultraman*, *Ultraman Ace*, *Ultraman Taro*, and *Jumborg Ace*. (CC ¶ 27; Ooka Decl. ¶ 4.) In the ensuing decades, Tsuburaya has developed or authorized the development of dozens of other audio-visual and literary works and products based on Ultraman, which have been released and marketed around the world, turning Ultraman into an international pop-culture icon. (CC ¶¶ 16-29; Ooka Decl. ¶ 4.)

B. Sompote's Campaign To Infringe Ultraman

In 1973 and 1974, Tsuburaya co-created two non-Ultraman movies, *Jumborg Ace* and *The 6 Ultra Brothers vs. the Monster Army*, with Sompote, a Thai individual, and his company, Chaiyo Productions ("Chaiyo"). (CC ¶¶ 30-31; Ooka Decl. ¶ 5.)

Apparently not satisfied with his authorized co-production of these works, at some unknown time, Sompote falsified a document, titled "License Granting Agreement" and bearing the date of March 4, 1976, that purported to grant to Sompote certain rights in nine specified Ultraman movies as an exclusive licensee of Tsuburaya in all territories except Japan (the "1976 Agreement"). (CC ¶ 32.) The document purported to bear the signature of Noboru Tsuburaya, the president of Tsuburaya as of 1976 who oversaw the growth of the Ultraman brand into a global force. (Ooka Decl. ¶¶ 6-7.)

² To the extent UMC's motion is construed as a motion for judgment on the pleadings under Rule 12(c), then all Tsuburaya's factual allegations must be accepted as true, and all inferences reasonably drawn from them must be construed in Tsuburaya's favor. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). Likewise, if UMC's motion is construed as seeking summary judgment under Rule 56, then the evidence must be viewed "in the light most favorable to" Tsuburaya, and all "[i]nferences must also be drawn in" Tsuburaya's favor. *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Assn*, 809 F.2d 626, 630-31 (9th Cir. 1987).

1 For more than two decades after he received his alleged rights under the 1976
2 Agreement, Sompote did not show that document to anyone and did not attempt to
3 exercise any of the rights that had allegedly been granted to him under it. (*See*
4 Declaration of Manu Rakwattanakul (“Manu Decl.”), ¶ 7, Ex. A at 37.) On the other
5 hand, during that time Tsuburaya continued to develop and exploit the Ultraman brand
6 around the world, including in the U.S. (CC ¶ 28; Ooka Decl. ¶ 4.)

7 In May 1996, one year after Noboru Tsuburaya died, Sompote presented the
8 1976 Agreement to Kazuo Tsuburaya—the company’s then-president—and demanded
9 that his alleged rights be honored. (Ooka Decl. ¶ 7.) Nobody from Tsuburaya (or
10 apparently from anywhere else) had ever seen or heard about the alleged 1976
11 Agreement. (*Id.*) After some initial uncertainty about whether the contract could
12 possibly be valid, Tsuburaya determined that it was, in fact, a wholesale forgery and
13 fabrication, and Tsuburaya has maintained that position ever since. (*Id.*)

14 Since 1996, Sompote has used the 1976 Agreement to justify a global campaign
15 of copyright and other infringements of Tsuburaya’s rights in Ultraman. (CC ¶ 33.) In
16 addition to his own exploitations of Ultraman, Sompote has transferred his alleged
17 rights under the document to his affiliated companies and family members, including
18 Chaiyo, his son Perasit, and then Perasit’s company, UMC. (UMC Complaint (Dkt. 1),
19 ¶ 11.) In turn, UMC has relied upon the rights it claims to hold under the 1976
20 Agreement to distribute Ultraman works in markets around the world, including in the
21 U.S., through its licensees, including counter-defendants TIGA and Golden Media
22 Group. (*Id.* ¶¶ 17-18.) Sompote too continues to rely on the 1976 Agreement to exploit
23 Ultraman, including in recent years through his licensee, counter-defendant Ultraman
24 USA. (*See* Declaration of Daniel Posner (“Posner Decl.”), ¶¶ 3-5, Exs. A-C.)³

25
26 ³ Although Tsuburaya has yet to take discovery from Sompote regarding his
27 infringements of Ultraman works in the U.S., public reports show that he was in Los
28 Angeles in May 2015—just days before UMC filed its complaint—to announce the
formation of Ultraman USA and promote his plans to create new Ultraman works for
the U.S. market. *See* Gaetos, Paula, “Chaiyo Studios Announces Plans for Future
Ultraman Products and Movies,” THE TOKUSATSU NETWORK (May 14, 2015), available
(footnote continued)

1 **C. Foreign Litigation Regarding Ultraman Rights**

2 Shortly after Sompote first presented the alleged 1976 Agreement to Tsuburaya
3 in 1996, a series of litigations ensued in Japan, Thailand and China over the validity
4 and scope of that agreement. As shown below, UMC fails to provide a complete and
5 accurate description of these foreign proceedings.

6 **1. Litigation In Japan**

7 **Japan Lawsuit No. 1:** The first lawsuit relating to the parties' rights in Ultraman
8 was filed by Tsuburaya in 1997 in Tokyo District Court against Sompote ("Japan
9 Lawsuit No. 1"). On April 27, 2004—in a decision which UMC does not argue is
10 preclusive—the Supreme Court affirmed a lower court ruling that Tsuburaya had not
11 established the falsity of the 1976 Agreement. (UMC RJN (Dkt. 77), Ex. B at 5-6;
12 Declaration of Tomohiro Tohyama ("Tohyama Decl.") ¶ 5.) As UMC fails to note,
13 however, the court also narrowly construed the 1976 Agreement as a "license to
14 exclusively exploit the copyrighted materials," but "not a transfer of the copyright
15 itself," such that Sompote "was not the owner of the copyrighted materials" and had no
16 rights to develop "future film works of the Ultraman series." (UMC RJN, Ex. B at 5.)

17 **Japan Lawsuit No. 2:** In 2009, Sompote sued Tsuburaya in Japan for copyright
18 infringement of certain Ultraman works ("Japan Lawsuit No. 2"). UMC later
19 intervened, effectively to replace Sompote as the plaintiff once Sompote's alleged
20 rights were transferred to it. On September 30, 2010, in a decision UMC argues should
21 be held preclusive here, the Tokyo District Court ruled in favor of Sompote on certain
22 of his claims. (UMC RJN, Ex. B at 1-2.) The court did not decide anew whether the
23 1976 Agreement was valid, but instead held that it had no authority to "overturn the
24

25 at [http://tokusatsunetwork.com/2015/05/chaiyo-studios-announces-plans-for-future-](http://tokusatsunetwork.com/2015/05/chaiyo-studios-announces-plans-for-future-ultraman-products-and-movies/)
26 [ultraman-products-and-movies/](http://tokusatsunetwork.com/2015/05/chaiyo-studios-announces-plans-for-future-ultraman-products-and-movies/) (last visited August 11, 2016). UMC, whose chairman
27 is Sompote's son Perasit, takes the position in this lawsuit that Sompote and Ultraman
28 USA have no rights to exploit Ultraman (*see* Joint Rule 26 Report, Dkt. 33, at 13 (UMC
anticipating a dispositive motion showing "Sompote Saengduenchai and Ultraman
USA, Inc. have no rights whatsoever to the Ultraman Works")), but that is another
matter that awaits further discovery.

1 previous litigation’s judgment” on that issue. (*Id.* at 43.) The court also declined to
2 follow a November 14, 2007 judgment of the Thai Supreme Court (“Thai Lawsuit No.
3 1,” discussed below) that found the 1976 Agreement to be a forgery, even though that
4 judgment post-dated the judgment in Japan Lawsuit No. 1. (*Id.* at 43, 53-54.)

5 Notably, UMC glosses over, and mischaracterizes, the appellate rulings in Japan
6 Lawsuit No. 2. In particular, UMC fails to notify the Court that the Tokyo District
7 Court decision was **overturned on appeal**, resulting in a judgment that, if preclusive,
8 would be extremely unfavorable to UMC, if not completely dispositive of its claims.

9 Specifically, on July 27, 2011, the Intellectual Property High Court of Japan
10 reviewed the lower court’s decision and held that (i) “[i]n the original judgment, the
11 part which [Tsuburaya] (defendant of the first trial) failed shall be withdrawn,” and the
12 “claims of [UMC] shall be dismissed”; (ii) the “appeal filed by [UMC] shall be
13 dismissed”; and (iii) the “legal fees shall be borne by [UMC] for both of the first and
14 second trials.” (UMC RJN, Ex. D at 292.) The court expressly “rendered a judgment
15 to the effect that there are **no grounds in [UMC’s] claims, including the parts**
16 **acknowledged by the original verdict**” of the district court. (*Id.* at 308 (emph. added.)

17 The court’s judgment rested on a number of reasons, including that the alleged
18 rights transferred to Sompote (and then allegedly to UMC) did not include “the rights
19 for producing secondary copyright matters” (i.e., derivative works) based on the
20 specific works enumerated in the 1976 Agreement, such that UMC had no valid claim
21 for infringement based on derivative works. (*Id.*) The court also held that pursuant to
22 an agreement dated January 29, 1998 between Chaiyo and Japanese toy company
23 Bandai (a large shareholder and a licensee of Tsuburaya), known as the “Non-
24 Contravention Agreement,” Chaiyo and its affiliates and subsidiaries, in exchange for a
25 payment of 100 million yen (less than \$1 million in USD as of 1998) from Bandai, had
26 **released all their claims**, then and in the future, against the “Bandai Group,” which
27 included Tsuburaya, including claims based on infringement of the alleged rights
28 granted in the 1976 Agreement, and also “**promised to Bandai Group not to exercise**

1 *any rights expected to arise currently or in the future with regard to all of the rights*
2 *stated in the” 1976 Agreement.* (*Id.* at 313-15.) Based on its interpretation of the Non-
3 Contravention Agreement, the court held that “the portion in the original verdict
4 wherein [Tsuburaya] lost is withdrawn, the claims by [UMC] are rejected, and the
5 appeal made by [UMC] is groundless and rejected.” (*Id.* at 316.)

6 In its motion (at p. 8), UMC further mischaracterizes Japan Lawsuit No. 2 by
7 stating that on April 26, 2012, the Supreme Court of Japan “declined to hear
8 *[Tsuburaya’s] appeal*” from the intermediate court. This is blatantly incorrect. In fact,
9 and as is plain from the copy of the Supreme Court decision provided by UMC (UMC
10 RJN, Ex. F), it was **UMC** (the “petitioner”) who appealed the judgment to the Supreme
11 Court—which makes sense given that the intermediate court’s decision was entirely
12 unfavorable to UMC—and who had its appeal rejected, again with a requirement that it
13 bear the costs of appeal. (*Id.* at 3-5.) Accordingly, Japan Lawsuit No. 2 was resolved
14 in a final judgment *in favor of Tsuburaya*.

15 2. Litigation In Thailand

16 As set forth in detail in the declaration of Manu Rakwattanakul, Tsuburaya’s
17 counsel in Thailand from Baker & McKenzie, final judgments have been entered in
18 Thailand in favor of Tsuburaya and against Sompote and his privies in a number of
19 cases turning on the validity of the 1976 Agreement, including at least three that are
20 more recent than the Japanese and Chinese judgments on which UMC relies:

21 **Thai Lawsuit No. 1:** On November 14, 2007, the Thai Supreme Court entered
22 judgment in favor of Tsuburaya on its claims for copyright infringement against
23 Sompote and Perasit, and held that the 1976 Agreement was a falsification and had
24 been forged. (Manu Decl. ¶¶ 3-6, Ex. A.) The court relied on a variety of evidence that
25 demonstrated the falsity of the 1976 Agreement, including a handwriting analysis
26 prepared by a committee of seven experts in document forgery from the Royal Thai
27 Police department who concluded unanimously that the alleged signature of Noboru
28 Tsuburaya was a forgery. (*Id.* ¶ 7, Ex. A & B.)

1 **Thai Lawsuit No. 2:** On October 26, 2011, the Thai Supreme Court entered a
2 judgment against Sompote on his claims for criminal defamation against agents of
3 Tsuburaya on the grounds that the 1976 Agreement was a forged document such that
4 Sompote had no claim that he had been defamed by alleged statements by Tsuburaya's
5 agents attesting to Sompote's lack of rights in Ultraman. (*Id.* ¶¶ 8-10, Ex. C.)

6 **Thai Lawsuit No. 3:** On June 17, 2014, the Thai Supreme Court entered
7 judgment in favor of Tsuburaya on its claims against a Sompote company called
8 "Tsuburaya Chaiyo" for trade-name infringement based on its unauthorized use of the
9 "Tsuburaya" name. (*Id.* ¶¶ 11-14, Ex. D.) The Court again concluded that the 1976
10 Agreement was a forged document such that it is not admissible to show that Tsuburaya
11 had allowed Sompote to use the name "Tsuburaya," as he claimed. (*Id.* ¶ 13, Ex. D.)

12 **Thai Lawsuit No. 4:** On December 30, 2015, the Thai Supreme Court entered
13 judgment in favor of Tsuburaya affirming the lower court's ruling that Sompote,
14 Tsuburaya Chaiyo and other defendants infringed Tsuburaya's copyrights in various
15 new Ultraman characters that the defendants had created, including on the grounds that
16 the new Ultraman works were not included in the 1976 Agreement and that 1976
17 Agreement was invalid. (*Id.* ¶¶ 15-19, Ex. E at 18-19.)

18 **Thai Lawsuit No. 5:** On January 13, 2016, the Thai Court of Appeal, in a ruling
19 that is now final and not subject to further appeal, affirmed a decision of the Thai
20 Criminal Court (the court of first instance in cases seeking criminal penalties) that held
21 that the 1976 Agreement is a forged document and ordered Sompote to serve two years
22 in jail and pay a fine for his illegal attempt to rely on the falsified 1976 Agreement in
23 Thai Lawsuit No. 1. (*Id.* ¶¶ 20-24, Ex. F.)

24 **Thai Lawsuit No. 6:** On December 16, 2015, the Thai Supreme Court entered a
25 judgment rejecting Tsuburaya's claim that Sompote and others had forged a separate
26 document that purported to amend the 1976 Agreement, though did so on the grounds
27 that even though the document had been falsified by an employee of counter-defendant
28

1 TIGA (which was not a defendant to that case), there was insufficient evidence that
2 Sompote participated in that conduct. (*Id.* ¶¶ 25-28.)

3 **Thai Lawsuit No. 7:** On December 30, 2015, in a copyright infringement
4 lawsuit raised by Tsuburaya against Sompote, Perasit, TIGA and others involving
5 infringements that were not at issue in Thai Lawsuit No. 1, the Thai Supreme Court
6 reversed a lower court decision that had wrongly dismissed the case for being
7 duplicative of Thai Lawsuit No. 1, and ordered the lower court to proceed with trial,
8 which has been scheduled for 2017. (*Id.* ¶¶ 29-30.)

9 Accordingly, despite UMC's attempt to overlook the series of final judgments in
10 Thailand that have been entered against its interests, the complete record of litigation in
11 Thailand reveals that Sompote and his privies have suffered defeat after defeat in cases
12 that turn on the validity of the 1976 Agreement.

13 **3. Litigation In China**

14 On September 30, 2005, Sompote and Chaiyo sued Tsuburaya and others in
15 China for copyright infringement (the "China Lawsuit"). As UMC notes (Mot. at 8), on
16 September 16, 2009 Tsuburaya prevailed in the court of first instance (the Intermediate
17 People's Court), which recognized the evidence from Thai Lawsuit No. 1, including the
18 expert handwriting analysis, and determined that the 1976 Agreement had been
19 falsified. (*See* UMC RJN, Ex. H at 24-25.)

20 On October 25, 2010, the court of second instance (the High People's Court)
21 reversed the lower court's ruling. (Posner Decl. ¶ 6, Ex. D.) Contrary to UMC's
22 argument (Mot. at 18) that "no party requested recognition of any prior Judgment in the
23 Chinese intermediate court," the court noted that, in the lower court, Tsuburaya had
24 "submitted the final judgment made by Thai court and the authentication conclusion
25 drawn by Thai authentication institution as contrary evidence to deny the authenticity of
26 the 1976 Contract," and that Sompote had submitted the Japanese judgments to support
27 his positions. (*Id.* at 24.) The court concluded, however, that the lower court had erred
28 by relying on the foreign judgments "[b]ecause the effect of the judgments made by the

1 Japanese and Thai courts isn't acknowledged by Chinese civil proceedings," such that
2 "***they have no legal effect in China and are unbinding.***" (*Id.* (emphasis added); see
3 Declaration of Peiguo Shen ("Shen Decl."), ¶¶ 4-11.)

4 As to the Thai handwriting report specifically, the court sated that "there is no
5 legal basis for directly finding the authentication conclusion drawn by Thai
6 authentication institution in China" (*Id.*) The court concluded that while Sompote
7 and Chaiyo had "submitted the 1976 Contract to prove their claims," Tsuburaya,
8 following the rejection of the evidence from Thailand, was left with "insufficient
9 [evidence] to deny the authenticity of the 1976 Contract." (*Id.*; *see also id.* at 26.)

10 With respect to the scope of the 1976 Agreement, the court of second instance
11 concluded, consistent with the Japanese courts, that the agreement simply conferred
12 upon Sompote the "exclusive right to use" the works enumerated in the document, but
13 did not transfer any copyrights in the works. (*Id.* at 28.)

14 On September 29, 2013, the Chinese Supreme People's Court affirmed,
15 concluding that "there is nothing inappropriate about the Court of Second Instance not
16 accepting the appraisal findings from the Thai Police Bureau General Office that were
17 submitted by" Tsuburaya, and that Tsuburaya's "application for recognition" of the
18 Thai judgment was properly rejected as well. (UMC RJN, Ex. H at 24-25.)

19 **D. UMC's Lawsuit Against Tsuburaya In The U.S.**

20 UMC filed its complaint on May 19, 2015, alleging that it "is the exclusive
21 holder of all rights granted under the 1976 Agreement," including "the indefinite right
22 to exploit the copyrights in the ULTRAMAN works, and all attendant exclusive rights
23 in copyright, in every country except for Japan." (Dkt. 1 at 5.)

24 On September 11, 2015, Tsuburaya filed counterclaims for copyright
25 infringement and declaratory relief against UMC, its licensees TIGA and Golden
26 Media, and Sompote and his U.S. licensee Ultraman USA. (Dkt. 19.) On December
27 14, 2015, Tsuburaya served TIGA with the counterclaims under the Hague Convention.
28 (Dkt. 52.) As Tsuburaya has described elsewhere (Dkts. 54, 63, 68, 71), Sompote

1 evaded service until June 27, 2016, when he was served in Bangkok. Sompote's
2 deadline to respond to the counterclaims passed on July 18, 2016, without any
3 response. On July 21, 2016, in response to the Court's OSC, Tsuburaya filed a Request
4 for Entry of Default against Sompote (Dkt. 71), which the Court denied on August 12,
5 pending Tsuburaya's submission of additional information regarding service (Dkt. 82).

6 The parties who have appeared in the case have engaged in discovery since
7 October 2015, including through written discovery and document productions. (Posner
8 Decl. ¶ 11.) Discovery has been slowed, however, by the difficulties of translating
9 information from foreign languages and obtaining information from foreign countries
10 and parties. (*Id.*) On July 26, 2016, the Court continued the trial date and pretrial
11 deadlines. (Dkt. 80.) Fact discovery now closes on January 1, 2017, expert discovery
12 closes on March 4, 2017, and the last day to hear motions is May 15, 2017.

13 Argument

14 Under Rule 12(c), "[j]udgment on the pleadings is properly granted when there is
15 no issue of material fact in dispute, and the moving party is entitled to judgment as a
16 matter of law." *Fleming*, 581 F.3d at 925. A defendant is not entitled to judgment on
17 the pleadings if the complaint raises issues of fact which, if proved, would support
18 recovery, and a plaintiff is not entitled to judgment on the pleadings if the answer raises
19 issues of fact or an affirmative defense which, if proved, would defeat recovery.
20 *General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist*
21 *Congregational Church*, 887 F2d 228, 230 (9th Cir. 1989).

22 Under Rule 56, summary judgment is appropriate where "the movant shows that
23 there is no genuine dispute as to any material fact and the movant is entitled to
24 judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

25 Under these standards, neither judgment on the pleadings nor summary judgment
26 should be granted in favor of UMC.⁴

27
28 ⁴ While UMC brings its motion with respect to Tsuburaya's "termination" defense
under Rule 56(c) only, it purports to raise its motion based on preclusion under Rule
(footnote continued)

1 **I. THE COURT SHOULD DECLINE TO APPLY PRECLUSION BASED**
2 **ON THE JAPANESE OR CHINESE JUDGMENTS**

3 **A. Neither Comity Nor The “Last-In-Time” Doctrine Applies In The**
4 **Face Of Inconsistent Foreign Judgments**

5 UMC’s motion asks this Court to apply two discretionary doctrines of preclusion:
6 comity and the “last-in-time” doctrine. As discussed below, the Court need not, and
7 should not, apply either of these discretionary doctrines.

8 *First*, with respect to comity, it is well settled that federal courts are “not required
9 to accept, at face value, the factual and legal conclusions of a foreign court.” *Beijing*
10 *Zhongyi Zhongbiao Elec. Inf. Tech. v. Microsoft Corp.*, 2013 WL 6979555, at *4 (W.D.
11 Wash. Oct. 31, 2013) (declining to follow judgment of Chinese court). Therefore,
12 “unlike *res judicata*,” the doctrine of comity “**does not require but merely permits**
13 **preclusion**.” *Smentek v. Dart*, 683 F.3d 373, 376 (7th Cir. 2012) (emphasis added); *see*
14 *also Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1155 (C.D. Cal.
15 2005) (federal comity is “an essentially voluntary deference to the acts of other
16 governments, undertaken for the common good even though no transnational institution
17 exists to exert any compulsion” (quoting 18 Wright, Miller & Cooper, Federal Practice
18 & Procedure sect. 4473)). Accordingly, “[t]he decision to grant comity is a matter
19 within a court’s discretion and the burden of proof to establish its appropriateness is on
20 the moving party.” *Maersk, Inc. v. Neewra, Inc.*, 2010 WL 2836134, at *10 (S.D.N.Y.
21 July 9, 2010) (quotation omitted).

22 UMC’s suggestion that a federal court should decline to recognize a foreign
23 judgment only in the event of manifest procedural unfairness (Mot. at 12) is erroneous.

24
25 12(c) or, in the alternative, Rule 56. As shown below, UMC’s motion should be
26 considered under Rule 56 in all respects because the application of preclusion requires
27 consideration of facts and evidence that are not encompassed by the parties’ pleadings,
28 as UMC acknowledges by submitting a Statement of Uncontroverted Facts and
Conclusions of Law (Dkt. 76-2) that relates, primarily, to its arguments based on
preclusion. Because UMC has failed to show that “there is no genuine dispute as to any
material fact” relating to preclusion or Tsuburaya’s “termination” defense, UMC has
failed to meet its burden under Rule 56 and its motion should be denied.

1 To the contrary, federal courts have analyzed a multitude of factors in deciding whether
2 to give preclusive effect to foreign decisions. For instance, in *Gordon & Breach*
3 *Science Publishers S.A. v. Am. Inst. of Physics*, the district court cited six factors
4 leading it to refuse deference to prior Swiss and German judgments:

5 Although no single element is dispositive, the following six factors point
6 against preclusion: (1) ***lack of reciprocity***—neither Switzerland nor
7 Germany recognizes the doctrine of collateral estoppel and thus would not
8 recognize a judgment rendered by an American court; . . . (3) ***civil law***
procedural differences (4) ***complications inherent in ascertaining***
foreign law; (5) ***selective and inconsistent use of collateral estoppel*** and
(6) existence of a conflicting French judgment.

9 905 F. Supp. 169, 179 (S.D.N.Y. 1995) (emphasis added); *see also Minebea*
10 *Co. v. Papst*, 13 F. Supp. 2d 35, 42 n.7 (D.D.C. 1998) (citing *Gordon & Breach*).
11 Moreover, courts should not apply comity to foreign court judgments that are not based
12 on a complete factual record. *See, e.g., Films by Jove Inc. v. Berov*, 250 F. Supp. 2d
13 156, 177 (E.D.N.Y. 2003) (declining to recognize French ruling on copyright claim
14 because, among other factors, French court failed to consider critical evidence);
15 *Maersk*, 2010 WL 2836134, at *13 (declining to apply preclusion where there was no
16 discovery in prior foreign lawsuit); Restatement (Second) of Judgments § 29 cmt. d
17 (“[p]reclusion may be withheld” based on differences in discovery procedures). As set
18 forth below, several of the same factors, among other factors, mitigate against
19 recognizing either the Japanese or Chinese judgments as a matter of comity.⁵

20 *Second*, the application of comity here is complicated by the fact that Thai,
21 Japanese and Chinese courts have entered differing judgments on the validity of the
22 1976 Agreement. UMC attempts to resolve this conflict by pointing to the “last-in-
23 time” doctrine, which recognizes that “[i]f two or more courts render inconsistent
24

25 ⁵ UMC’s reliance on *Ohno v. Yasuma* (Mot. at 13-14) is misplaced. In that case, the
26 Ninth Circuit did not address whether a foreign judgment should be recognized as a
27 matter of comity, but rather whether recognition was mandatory pursuant to
28 California’s Uniform Foreign-Country Money Judgments Recognition Act, which does
not apply here. 723 F.3d 984, 1002 (9th Cir. 2013) (“Absent a demonstrated ground for
non-recognition, enforcement of a qualifying foreign-country money judgment is
mandatory under California’s Uniform Act.”).

1 judgments on the same claim or issue, a subsequent court is normally bound to follow
2 the most recent determination that satisfies the requirements of res judicata.” *Robi v.*
3 *Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988).

4 As UMC acknowledges, however (Mot. at 17-18), the “last-in-time” doctrine is
5 not premised on comity, but instead on the assumption that “the subsequent court could
6 have or did consider the *res judicata effect* of earlier cases.” *Robi*, 838 F.2d at 328
7 (emphasis added). This is because where “the most recent court to decide the matter
8 may have considered and rejected the operation of the prior judgment as res judicata,
9 . . . its decision should be treated as res judicata on the preclusive effect of the prior
10 judgment.” *Id.* at 323. As has long been recognized, however, this reasoning has no
11 application to inconsistent judgments entered by *foreign* courts, which are not bound by
12 the Full Faith and Credit Clause of the U.S. Constitution to apply res judicata to each
13 other’s decisions, such that no purpose would be served by deferring to the “last-in-
14 time” judgment. *See, e.g.,* Hans Smit, *International Res Judicata and Collateral*
15 *Estoppel in the United States*, 9 UCLA L. REV. 44, 46 n.13 (1962) (“It is clear that (the
16 last-in-time) rule can be applied to foreign judgments only after it has been established
17 that the law of the second foreign forum recognizes the res judicata effect of prior
18 foreign judgments.”). Thus, when faced with multiple inconsistent *foreign* judgments,
19 the “the court may recognize the earlier judgment or neither of them.” Restatement
20 (Third) of Foreign Relations Law § 482 cmt. g; *see* Restatement (Second) of Conflict of
21 Laws § 114 cmt. d (“It is uncertain whether the [last-in-time doctrine] will be applied to
22 judgments rendered in a foreign nation.”).

23 Notably, UMC cites to no cases in the Ninth Circuit or California applying the
24 “last-in-time” doctrine to foreign judgments. The *only* case UMC cites for this
25 proposition, *Koehler v. Bank of Bermuda Ltd.*, 2004 WL 444101, at *18 (S.D.N.Y.
26 Mar. 10, 2014), did not actually apply that doctrine to a foreign judgment and did not
27 even address whether the doctrine *should be applied* where the second forum had no
28 obligation to recognize the earlier foreign judgment. Moreover, *Koehler* is based on

1 New York state law, which has been criticized for its occasional extension of the last-
2 in-time doctrine to foreign judgments. *See Ackerman v. Ackerman*, 676 F.2d 899, 903
3 n.5 (2d Cir. 1982) (“Ruth Bader Ginsburg has criticized the New York holdings
4 applying the last-in-time rule to foreign-country judgments on the grounds that a
5 foreign nation’s courts, unlike those of a sister state, are not necessarily obligated to
6 accord full faith and credit to prior judgments.”).⁶

7 What’s more, even New York courts have declined to apply the last-in-time
8 doctrine when faced with foreign decisions that did not themselves recognize principles
9 of res judicata. *See, e.g., Films by Jove*, 250 F. Supp. 2d at 177 n.26 (rejecting later-in-
10 time international ruling because the last-in-time doctrine “rests in part on the
11 presumption that the later court will have already considered the preclusive effect of the
12 earlier ruling. Here such a presumption clearly does not obtain.”); *Byblos Bank Europe*
13 *S.A. v. Syrketi*, 819 N.Y.S.2d 412, 417 (N.Y. Sup. Ct. 2006) (“[T]he applicability of the
14 last-in-time rule is not established [where] the later foreign country judgment is
15 rendered by a court that . . . is not required to recognize an earlier foreign judgment
16 where it disagrees with the earlier foreign court’s determination on the merits.”).

17 Federal courts thus have no obligation to apply comity or the “last-in-time”
18 doctrine in the face of multiple inconsistent foreign judgments. For the reasons
19 discussed below, the Court should decline to do so here.

20 **B. Were The Court To Apply The “Last-in-Time” Doctrine At All, The**
21 **Appropriate Decisions To Follow Would Be From Thailand**

22 As a threshold matter, even if the Court were inclined to defer to the foreign
23 judgment that is the “last-in-time” on the validity of the 1976 Agreement, then it would
24

25 ⁶ UMC’s other authorities applied the “last-in-time” doctrine only to prior *domestic*
26 judgments, and are thus irrelevant to whether international comity should apply in the
27 face of multiple inconsistent *foreign* judgments. *See, e.g., Treinies v. Sunshine Mining*
28 *Co.*, 308 U.S. 66, 74-78 (1939) (Washington and Idaho state judgments); *Valley Nat’l*
Bank of Arizona v. A.E. Rouse & Co., 121 F.3d 1332, 1335-36 (9th Cir. 1997) (Arizona
federal and state judgments); *Americana Fabrics, Inc. v. L&L Textiles, Inc.*, 754 F.2d
1524, 1529-30 (9th Cir. 1985) (California state and New York federal judgments).

1 follow one of the recent judgments from Thailand that found *in favor of Tsuburaya*,
2 and not the earlier judgments from Japan or China on which UMC relies.

3 Specifically, in judgments entered on June 17, 2014 (Thai Lawsuit No. 3) and
4 December 30, 2015 (Thai Lawsuit No. 4) by the Thai Supreme Court, and on January
5 13, 2016 (Thai Lawsuit No. 5) by the Thai Court of Appeals, the 1976 Agreement was
6 determined to be invalid, forged and falsified, and Tsuburaya was granted relief against
7 Sompote and his privies that turned on the invalidity of that document. Indeed, in Thai
8 Lawsuit No. 4, Sompote was sentenced to *two years in jail* for having falsified the 1976
9 Agreement and proffered it to the court. (Manu Decl. ¶ 18, Ex. E.) These Thai
10 judgments are plainly the “last-in-time” on the validity of the 1976 Agreement. UMC
11 does not even argue otherwise—it simply ignores them. Thus, at a minimum, UMC has
12 not met *its burden* of showing that the Court should follow the Japanese or Chinese
13 judgments as the “last-in-time.” *See Maersk*, 2010 WL 2836134, at *10.⁷

14 Further, UMC cannot avoid the preclusive effect of the Thai judgments on the
15 grounds that it was not a party to those cases. Rather, as Tsuburaya reserves its right to
16 argue later, those judgments are preclusive against UMC because all the elements of res
17 judicata (or issue preclusion) apply, for the same reasons as UMC argues in its motion
18 (at pp. 20-21). That UMC was not formally a party to the Thai lawsuits does not defeat
19 preclusion because UMC is plainly in contractual privity with the parties against whom
20 the Thai judgments were entered—including Sompote and Perasit. *See, e.g., Tahoe—*
21 *Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064,
22 1081 (9th Cir. 2003) (privity will be found where two parties have a “sufficient
23 commonality of interests”) (citations omitted); *Citizens for Open Access to Sand &*

24
25 ⁷ Even to the extent the recent Thai judgments relied on the earlier judgment in
26 Thai Lawsuit No. 1 to determine that the 1976 Agreement is invalid, this does not mean
27 that they are not the “last in time” on the question of the validity of the 1976
28 Agreement. Indeed, this is precisely what the Tokyo District Court did in Japan
Lawsuit No. 2, in reliance on the earlier judgment in Japan Lawsuit No. 1, in a decision
that UMC argues should be held preclusive here. Thus, by UMC’s own reasoning, the
judgments in Thai Lawsuit Nos. 3, 4 and 5 are the “last-in-time” on the validity of the
1976 Agreement even if they did not make that determination in the first instance.

1 *Tide, Inc. v. Seadrift Ass’n*, 60 Cal. App. 4th 1053, 1069 (1998) (privity may be
2 established by “a mutual or successive relationship to the same rights of property”).⁸

3 Accordingly, if any foreign judgment relating to the validity of the 1976
4 Agreement should be recognized here as the “last-in-time,” it is one of the recent
5 judgments of the Thai courts that found *in favor of Tsuburaya* on that question.⁹

6 **C. The “Last-In-Time” Doctrine Does Not Apply Because Neither The**
7 **Japanese Nor Chinese Courts Applied Res Judicata Themselves**

8 Even if either of the Japanese or Chinese judgments was, as a matter of
9 chronology, the “last-in-time,” and neither is, that doctrine still should not be applied to
10 those judgments because neither court applied res judicata to the earlier judgment in
11 Thai Lawsuit No. 1, thus negating the very premise of the “last-in-time” doctrine.

12 *First*, UMC does not even argue that the District Court in Japan Lawsuit No. 2
13 applied res judicata to the earlier judgment in Thai Lawsuit No. 1—which, at the time,
14 was the most recent final judgment on the question of the validity of the 1976
15 Agreement—and the court plainly did not do so. To the contrary, while the court
16 acknowledged the existence of the Thai judgment, it rejected it out of hand because it

17 ⁸ Moreover, discovery may reveal that there is no corporate separateness among the
18 various parties to the lawsuits against Tsuburaya, including Sompote, Perasit, Chaiyo,
19 TIGA and UMC. To the extent UMC asserts that it is not in privity with those parties,
20 then Tsuburaya should be entitled to explore that issue through discovery before the
preclusive effect of the Thai lawsuits is decided. (*See* Posner Decl., ¶ 17.)

21 ⁹ Recognizing that it is vulnerable to a claim that the Thai judgments are preclusive
on it, UMC takes a veiled shot at opposing such preclusion by arguing that the
22 judgment in Thai Lawsuit No. 1 is suspect because it allegedly was “procured through
bribery.” (Mot. at 23.) In support, UMC relies on a vague and hearsay declaration of a
23 disgruntled former employee of Tsuburaya who purports to identify “secret” payments
Tsuburaya made to a mysterious “Mr. M” for “behind the scenes” influence over the
24 Thai courts. (Wexler Decl., Ex. E.) Not only does this declaration, even if credited,
establish nothing about “bribery,” but it is flatly belied by evidence already in the
25 record, which shows that a *Mr. Manas* actually—and not “secretly”—acted as
Tsuburaya’s appellate counsel in Thai Lawsuit No. 1, including by signing Tsuburaya’s
26 appellate brief and appearing before the Thai Supreme Court, and that, unsurprisingly,
he was paid for that work. (Manu Decl., ¶ 32.) Indeed, the Thai Supreme Court even
27 acknowledged that Mr. Manas was “empowered” to act as Tsuburaya’s counsel. (*Id.*,
Ex. A at 32.) To the extent UMC pursues this bogus theory of bribery, it will be
28 disproven based on the evidence. For present purposes, however, because, as UMC
admits, this declaration is insufficient to show as a matter of law that the Thai
judgments are not final and binding, it has no bearing on the outcome of this motion.

1 “contradicts with the acknowledgment made by this court and the judgment of the
2 Tokyo High Court [in Japan Lawsuit No. 1].” (UMC RJN, Ex. B at 53-54.)

3 *Second*, and likewise, the Chinese courts declined to recognize the judgment in
4 Thai Lawsuit No. 1, and concluded that they had no basis to even do so. (See Shen
5 Decl., ¶¶ 4-10.) Although they acknowledged—contrary to UMC’s misleading
6 argument (Mot. at 18)—that Tsuburaya had submitted the Thai judgment to the courts
7 and requested that it be recognized (Posner Decl. ¶ 13, Ex. D at 24; UMC RJN Ex. H at
8 24-25), the court of second instance, in a ruling affirmed by the Supreme People’s
9 Court, concluded that the Thai judgment has no “legal force” in China and is “non-
10 binding” (Posner Decl., Ex. D at 24; UMC RJN, Ex. H at 24-25).

11 Thus, even if the Japanese or Chinese judgments were later-in-time than the Thai
12 judgments, there would be no basis for this Court to defer to them as the “last-in-time,”
13 because neither court recognized the prior judgment of the Thai court.¹⁰

14 **D. For Independent Reasons, The Court Should Decline To Follow The**
15 **Japanese Or Chinese Judgments**

16 For multiple independent reasons, neither the Japanese nor Chinese judgments
17 should be followed as a matter of comity or preclusion.

18 **1. The Japanese Judgment Was Reversed On Appeal And Is**
19 **Therefore Not Binding**

20 UMC’s argument that the Court should follow the district court’s judgment in
21 Japan Lawsuit No. 2 fails regardless of whether that judgment is the “last-in-time”
22 because it was *overturned on appeal*, and thus is not a final adjudication on the merits.
23 Issue preclusion applies only when, among other things, “the first proceeding ended
24 with a final judgment on the merits.” *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir.

25 ¹⁰ As Tsuburaya explains in its objections to UMC’s Request for Judicial Notice, to
26 the extent UMC is attempting to use judicial notice to establish whether and to what
27 extent the Japanese and Chinese courts applied res judicata based on the earlier Thai
28 judgment, UMC’s request to do so is improper and should be rejected. Because UMC
has submitted no other evidence regarding the law of preclusion in Japan and China, it
has failed to meet its burden of showing no genuine dispute regarding the relevant
foreign law. See Fed. R. Civ. P. 44.1 (governing determinations of foreign law).

2011). Thus, “a reversed or dismissed judgment cannot serve as the basis for a disposition on the ground of res judicata or collateral estoppel.” *Ornellas v. Oakley*, 618 F.2d 1351, 1356 (9th Cir. 1980); Tohyama Decl. ¶ 6.

Because the Japanese District Court’s decision is not “final,” and in fact was *reversed*, there is no basis to give any preclusive effect to that decision.

2. Comity Should Not Apply Because Tsuburaya Was Not Afforded Adequate Discovery In Japan and China

As noted above, courts should not defer to foreign judgments that are based on an incomplete factual record. *See, e.g., Films by Jove Inc.*, 250 F. Supp. 2d at 177; *Maersk*, 2010 WL 2836134, at *13. Based on this concern, the Court should decline to defer to the Japanese or Chinese judgments because Tsuburaya was not permitted to take discovery—including depositions and document productions—in either case, and thus was unable to collect evidence that could have established the invalidity of the 1976 Agreement. (*See* Tohyama Decl. ¶ 4; Shen Decl. ¶ 12.)

Indeed, in China, Tsuburaya not only had no opportunity to develop evidence through discovery, but the courts flatly refused to permit Tsuburaya to rely on evidence generated in Thailand, including the report of seven handwriting experts from the Thai Police Bureau General Office determining that the 1976 Agreement was a forgery. (Posner Decl., Ex. D at 24-26; UMC RJN, Ex. H. at 24-25.) Without the benefit of discovery in China or the evidence it collected in Thailand, the higher courts found that Tsuburaya had “insufficient” evidence to show that the contract was “fake.” (*Id.*)

Tsuburaya was thus substantially prejudiced in Japan and China by the absence of discovery and the exclusion of relevant evidence from Thailand. Because Tsuburaya has ample discovery procedures available to it in this case that will assist it in establishing the falsity of the 1976 Agreement, including document productions and depositions (*see* Posner Decl., ¶ 21), the Court should decline to exercise its discretion to apply comity to either the Japanese or Chinese decision.

1 **3. The Court Should Reject UMC’s Backdoor Attempt To Apply**
2 ***Offensive* Issue Preclusion**

3 Notably, UMC seeks to apply preclusion to Tsuburaya’s counterclaims but it
4 hardly addresses its own affirmative claims—which are simply the flip-side of
5 Tsuburaya’s claims. UMC likely avoided arguing for offensive issue preclusion
6 because courts consistently decline to apply it in the face of inconsistent prior
7 judgments, let alone inconsistent prior *foreign* judgments. Indeed, the Supreme Court
8 has observed that “[a]llowing offensive collateral estoppel may . . . be unfair to a
9 defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent
10 with one or more previous judgments in favor of the defendant.” *Parklane Hosiery Co.*
11 *v. Shore*, 439 U.S. 322, 331 (1979). Based on this concern, the Ninth Circuit, in a case
12 on which UMC relies, refused to apply offensive collateral estoppel against a defendant
13 that had previously obtained a successful judgment on the same issue against the same
14 plaintiff, noting that doing so would present an “enormous[]” unfairness, and would
15 encourage, not discourage, multiple litigations. *Robi*, 838 F.2d at 380; *see also Jack*
16 *Faucett Assocs. v. AT&T Co.*, 744 F.2d 118 (D.C. Cir. 1984) (holding that “in light of
17 [an] inconsistent determination, the district court abused its discretion in granting
18 plaintiffs’ motion for offensive estoppel”).

19 Because UMC is not entitled to offensive issue preclusion with respect to its
20 affirmative claims, the question of the validity of the 1976 Agreement will need to be
21 decided based on the evidence at least with respect to those claims. In this situation, it
22 makes no sense to apply preclusion with respect to UMC’s counterclaims either, as
23 doing so would generate no efficiencies, and could only lead to undue complications.

24 Moreover, because Tsuburaya’s affirmative defenses—another target of UMC’s
25 motion—are directed to UMC’s affirmative claims, UMC’s request to have certain of
26 those defenses dismissed on the basis of preclusion is also an exercise of *offensive*
27 issue preclusion, and therefore should be denied. *Cf. Hunter v. Transamerica Life Ins.*
28

1 Co., 498 Fed. Appx. 430, 438-39 (5th Cir. 2012) (rejecting plaintiff's attempt to
2 preclude defendant's affirmative defense using offensive issue preclusion).

3 **4. The Court Should Decline To Apply Comity Because Of The**
4 **Substantial Evidence Contradicting The Japanese And Chinese**
5 **Judgments**

6 Finally, the Court should decline to apply comity to either the Japanese or
7 Chinese judgment because those judgments are belied by evidence Tsuburaya has
8 already obtained, and further because Tsuburaya should have the opportunity to
9 develop additional such evidence through discovery. *See Films by Jove*, 250 F. Supp.
10 2d at 196, 205 (declining to apply comity based on foreign decision where "there are
11 strong reasons to question the accuracy of the . . . decision on its face").

12 While discovery is far from complete, Tsuburaya has already obtained the
13 opinion of a highly experienced expert in the field of handwriting analysis, Lloyd
14 Cunningham, who analyzed the purported signature of Noboru Tsuburaya on the 1976
15 Agreement and concluded, *with the highest degree of certainty his field offers*, that the
16 signature was forged. (Declaration of Lloyd Cunningham ¶¶ 7-11.) Mr. Cunningham's
17 conclusion is thus fully consistent with that of the Thai handwriting experts that the
18 Thai courts and the lower Chinese court relied upon in concluding that the document
19 was forged, but that the higher Chinese courts inexplicably rejected out of hand.

20 In addition to this evidence, the fact that Sompote has steadfastly evaded service
21 of Tsuburaya's counterclaims and now has declined to appear in the case to defend his
22 alleged rights under the 1976 Agreement is further evidence of the falsity of that
23 document. Indeed, that UMC waited to file this motion (which it argues can be decided
24 based on the pleadings alone) until almost a year after Tsuburaya filed its
25 counterclaims, and then only after Tsuburaya filed a proof of service of its
26 counterclaims on Sompote, shows that UMC's motivation is to obtain a ruling that the
27 1976 Agreement is valid before having to face the evidence—including the
28 repercussions from Sompote's refusal to participate in this case. As set forth in the
Posner Declaration, Tsuburaya will continue to develop evidence showing that the 1976

1 Agreement was falsified, and, pursuant to Rule 56(d), it should be permitted a full
2 opportunity to do so before any decision is made regarding the validity of that
3 document. (Posner Decl. ¶¶ 14-23.) Thus, to the extent there is not already sufficient
4 evidence to support the denial of UMC's motion on the grounds that the Japanese and
5 Chinese judgments were wrong, then the motion should at least be deferred to allow
6 Tsuburaya to continue to gather such evidence through discovery.

7 **II. EVEN IF PRECLUSION APPLIES, UMC IS NOT ENTITLED TO THE**
8 **BROAD RELIEF IT SEEKS**

9 Even if UMC were to prevail in showing that TPC is barred from re-litigating the
10 invalidity of the 1976 Agreement—which is the most that UMC attempts to establish—
11 UMC would not be entitled to much of the relief it seeks by its motion.

12 *First*, UMC seeks the dismissal of TPC's counterclaims for copyright
13 infringement and declaratory relief. (*See* Dkt. 76-3, at 1-2.) It is not entitled to this
14 relief based on the arguments advanced in its motion, however, because the validity of
15 the 1976 Agreement is but one factual question relevant to TPC's counterclaims. In
16 particular, even if the 1976 Agreement is deemed "valid," Tsuburaya's claims would
17 still survive to the extent they are premised on UMC's acts of exploitation of Ultraman
18 works that are in excess of UMC's rights under that agreement.

19 As discussed above, *supra* at pp. 6-11, and as UMC notably omits to mention,
20 each of the foreign courts that has addressed the validity of the 1976 Agreement has
21 also concluded that it transferred no copyrights in any Ultraman works and granted no
22 rights to create derivative works. (UMC RJN, Ex. B at 5, Ex. H. at 28; Manu Decl., ¶
23 12.) The Japan courts also concluded that Sompote, and thus UMC as his licensee,
24 have released their claims relating to Tsuburaya's exploitation of Ultraman and further
25 agreed not to exploit Ultraman themselves. (UMC RJN, Ex. D at 28.) Fact issues need
26 to be determined as to whether UMC's actions with respect to Ultraman have exceeded
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1 its rights, assuming it has any rights, and thus infringed Tsuburaya's copyrights. Thus,
2 even if preclusion is applied, there is no basis to dismiss TPC's counterclaims.¹¹

3 *Second*, even if the Court finds the 1976 Agreement "valid" as a matter of issue
4 preclusion, there is no basis to dismiss Tsuburaya's tenth affirmative defense that
5 UMC's claims are barred by res judicata or eleventh affirmative defense based on the
6 invalidity of the 1976 Agreement. As noted above (*supra* at pp. 20-21), UMC cannot
7 use preclusion offensively against Tsuburaya's affirmative defenses. And even if it
8 could, these defenses remain viable, and thus should not be dismissed, even if the 1976
9 Agreement is deemed "valid" to the extent they are based on prior rulings (as for the
10 tenth defense) or grounds for invalidity (as for the eleventh defense) other than the
11 falsity of the 1976 Agreement, which is the only issue UMC seeks to have established
12 as a matter of preclusion. It would be premature and improper to adjudicate these
13 defenses now, and UMC's request to do so should be denied.

14 **III. SUMMARY JUDGMENT SHOULD BE DENIED AS TO TSUBURAYA'S**
15 **DEFENSES BASED ON "TERMINATION"**

16 UMC's motion for summary judgment on the issue of whether the 1976
17 Agreement has been "terminated" should be denied. This argument is premised on the
18 erroneous assumption that Tsuburaya's "termination" defense is based solely on the
19 two Japanese statutes that Tsuburaya identified in earlier correspondence with UMC in
20 which Tsuburaya, without acknowledging the validity of the 1976 Agreement,
21 terminated it. (*See* Mot. at 23-25.) But UMC has never before asked about the basis
22 for Tsuburaya's termination defense (for example, it has never served an interrogatory
23 asking for the facts or theories supporting Tsuburaya's defenses), and it therefore has
24 no basis to assume that the defense turns only on these two statutes. To the contrary,
25 Tsuburaya reserves its right to prove that the 1976 Agreement was terminated as a

26 ¹¹ TPC reserves its right to move for summary judgment on its counterclaims and
27 UMC's affirmative claims, including based on the preclusive effect of the prior
28 judgments and on evidence that will be developed through discovery regarding the
validity and scope of the 1976 Agreement, the effect of the Non-Contravention
Agreement, and the counter-defendants' acts of infringement.

1 result of UMC's and its predecessors' material breaches of the agreement, including
2 through their acts of exploitation that exceed the scope of the agreement. Under
3 federal, California and Japanese law, a material breach of a contract of indefinite
4 duration is grounds for its termination. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 585-86
5 (9th Cir. 1993) ("[U]nder federal and state law a material breach of a licensing
6 agreement gives rise to a right of rescission which allows the nonbreaching party to
7 terminate the agreement."); Tohyama Decl. ¶ 17. Tsuburaya should be permitted to
8 develop evidence to show that the 1976 Agreement is subject to termination as a result
9 of the counter-defendants' material breaches. (See Posner Decl. ¶¶ 22-23.)

10 Moreover, even as to the two Japanese statutes UMC identifies, UMC does
11 nothing to show that they do not, and could not, apply here other than to argue (Mot. at
12 23) that they do not apply "[o]n their face." As discussed in the Tohyama Declaration,
13 however, there is ample authority in Japan that would entitle Tsuburaya to prevail in
14 showing that these statutes may be applied to intellectual property license agreements
15 of indefinite duration. (See Tohyama Decl. ¶¶ 10-16; Tsuburaya's Notice of Lodging
16 of Non-U.S. Authorities.) Again, Tsuburaya should be entitled to develop the evidence
17 to support the application of these statutes, including through expert analysis of
18 Japanese law (expert discovery does not even commence until March 2017). At a
19 minimum, UMC's motion should be denied as premature.

20 Conclusion

21 For the foregoing reasons, UMC's motion should be denied in full.
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Respectfully submitted,

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6 By /s/ Daniel C. Posner

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